No. 872

Supreme Court of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE HOD CARRIERS AND OPERATING ENGINEERS UNIONS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, A TREATY TRIBE OF INDIANS, *et. al.*, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL HOD CARRIERS', BUILDING & COMMON LABORERS' UNION OF AMERICA, AFL-CIO, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *et. al.*

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OPINIONS BELOW

The opinion of the National Labor Relations Board is reported at 126 N.L.R.B. 603. The opinions of the District Court and of the Court of Appeals are not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Labor Management Relations Act, 1947, as amended, is rendered inapplicable to an interstate non-Indian business because it happens to be located on an Indian Reservation?

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947, as amended, are set forth in Appendix C, pp. A-9-12 of the Petition.

STATEMENT

In view of the Statement set forth in the brief in opposition submitted by the National Labor Relations Board, no useful purpose would be served by including a similar statement herein and, accordingly, we adopt and incorporate by reference the statement contained in the Board's brief.

ARGUMENT

Stated succinctly and bluntly, we do not believe that employees of a large interstate non-Indian business are not entitled to the benefits and protections of national labor relations laws simply because their employer has an Indian Tribe for its landlord. Yet this is the view of the Navajo Tribe—a view which both the District Court and the Court of Appeals properly and summarily rejected.

In both lower courts, the Tribe had argued, in essence, that whenever Indians and their interests have been the subject affected by legislation, they have been named and their interests specifically dealt with, that Congress has power to regulate not only interstate and foreign commerce but also "commerce with the Indian tribes" and that the absence of any reference in the Labor Management Relations Act to commerce with Indian Tribes is a plain indication of Congress' intention to preclude the Act's application to Indians and their reservations. This is essentially the same kind of argument as was made by the Tuscarora Tribal Nation in *Federal Power Commission* v. *Tuscarora*, 362 U.S. 99, an argument which this Court rejected, stating that at least since *Chotegu* v. *Burnet*, 283 U.S. 691, "The intent to exclude must be definitely expressed, where . . . the language of the Act . . . is broad enough to include the subject matter" (283 U.S. at 696). We submit that the

decisions below are in accord with hitherto settled standards for the interpretation of legislation affecting Indians.

The petitioner now seeks review for the reasons "that the court below . . . has violated the Navajo Tribe's solemn compact with the United States" (Pet. p. 8); that "it is at once apparent that the Act is in conflict . . . with *the Tribe's legislative exclusion of union solicitors*" and "if the Treaty prevails . . : then *the Tribe's power to exclude union membership is absolute*, and, since solicitation of union membership is obviously protected under the Act, *it follows* that the Act must be inapplicable within the Reservation" (emphasis supplied) (Pet. pp. 8-9); that "the resolution of that conflict between the Treaty and the Act involves [a] question . . . of construction" (ibid); and that "since the exercise of the rights under [National Labor Relations Act and Labor Management Relations Act] is necessarily in conflict with the *Navajo Tribe's right to exclude outsiders* . . . it follows that . . . the Tribe's treaty rights must prevail" (emphasis supplied) (Pet. p. 10). Accordingly, the Petitioner "submit[s] that the holding below, to the effect that the general terms of a labor management enactment are to be construed to curtail the *Navajos' treaty rights to exclude outsiders* from their Reservation, so far runs counter to hitherto settled doctrines, and so seriously threatens to disrupt the tribal life of an untutored and dependent people as yet unprepared to cope with the incidents of industrialization as to require review . . . by this Court" (emphasis supplied) (Pet. p. 11).

The foregoing views of the Petitioner have been designedly set forth in some detail so that there can be no question as to the precise thrust of Petitioner's request for review, namely, the alleged conflict between the provisions of the Labor Management Relations Act and the Tribe's Treaty right to exclude outsiders from its Reservation. But that is not the issue *in this case*, even though it is conceivable that such an issue may directly arise under different circumstances in another case at another time.

Here, the sole issue is whether the Act is applicable to an interstate business on an Indian Reservation. Petitioner answers in the negative and argues that application of the Act necessarily conflicts with the Tribe's treaty right to exclude outsiders. No such conflict necessarily exists, as is plainly shown in the next paragraph, and, accordingly, since in deciding this case it is unnecessary for this Court to resolve such an alleged conflict, there is no sound basis for this Court's review for the reasons urged by Petitioner.

That the question of the Act's application is one that is completely separate and apart from the question of the scope of the Tribe's right to exclude outsiders is readily demonstrable. The question of the Act's application would obviously be the only question in issue in a case in which all of the employees and Union organizers involved were Indians residing on the Reservation; the complete absence of any outsider would clearly preclude consideration of the question of the Tribe's right to exclude. Thus, the applicability of the Act must be determined without reference to the Tribe's right to exclude for, plainly, if the Act is inapplicable then the right to exclude remains unaffected and if it is decided that the Act applies then it must apply wholly irrespective of the Tribe's right to exclude outsiders. Otherwise, we might have the absurd situation of applicability to an all-Indian situation but non-applicability where outsiders are involved.

With respect to the basic question of the applicability of the Act, apart from the alleged conflict with the right to exclude, the petition fails to demonstrate that the decision below is not in accord with decisions of this Court or is in conflict with decisions of other Circuit Courts of Appeals or, indeed, in what manner error has been committed. In the absence of such a showing, we submit that review is unwarranted.

Moreover, for reasons above stated, since the Tribe's right to exclude is not necessarily in issue here, review of this case would not determine the scope or application of such right. This case arose by virtue of the Tribe's chal-

lenge to the jurisdiction of the Board to hold an election. Such an election could be held without any party challenging the Tribe's right to exclude[1] Such a challenge, however, would directly raise the question for judicial determination for the first time and if that is the issue in which the Tribe is primarily interested the instant case is inappropriate for its resolution. Accordingly, no sound reason has been presented to impel this Court to grant the requested writ, and no purpose would be served in granting certiorari if the sole reason for review lies the Tribe's concern for its Treaty right to exclude outside

Apart from the legal arguments advanced in the petition, the petitioner apparently believes its position is somehow supported by an allegation that "illiterate, poorly educated" Navajo Indians are "incapable of determining for themselves the advantages and disadvantages of unionization, how to vote upon or manage the ordinary business of a union". (Pet. pp. 7-8) The record hardly establishes that this is the proper view of the Tribe's capacity for safeguarding its own interests. Such a view ignores "a quarter century of organizational activity on the [Navajo] Indian Reservation". (J.A. 98). As the record indicates, "since 1934 the International [Hod Carriers', Building and Common Laborers' Union of America] and its affiliates have been actively engaged in representing workers employed on and adjacent to the reservation, including thousands of Navajo Indians living on and off the reservation "and" at the present time the Union has as members, over 500 Navajos" (J.A. 97).

We submit that the decision below to the effect that the Labor Management Relations Act of 1947, as amended, is applicable to activities affecting interstate commerce whether such activities are on or off an Indian Reservation is correct in the absence of an express statutory exemption

[1] No question arises as to the right of Government personnel to enter the Reservation for the purpose of holding an election since under Article II of the Treaty "agents and employees of the government . . . [may] . . . enter upon Indian reservations in discharge of duties imposed by law" (Pet. App. C, p. A9).

for Indians or their Reservations and, accordingly, neither review or rectification is required by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted

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